*Present:* The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

*1908.*
*March 25.*

DINGIRIYA *v.* PAYNE *et al.*

*D. C., Kurunegala, 3,121.*

*Possessory action by lessee—Dispossession—Superior title of person dispossessing—Alternative claim against lessor—Ordinance No. 22 of 1871.*

Where a lessee of immovable property who has been in possession is dispossessed of such property by a purchaser of the same from the lessor otherwise than by process of law, the lessee is entitled to be restored to possession under section 4 of Ordinance No. 22 of 1871, even though such purchaser may have a better title to the property.

In an action against a trespasser for restoration of possession, the lessee may join an alternative claim against the lessor for the return of the lease money.

*Fernando v. Waas* [1] followed.

APPEAL by the plaintiff from a judgment of the District Judge of Kurunegala (Bertram Hill, Esq.). The facts material to the report sufficiently appear in the judgments.

*Bawa*, for the plaintiff, appellant.

*Weinman*, for the defendants, respondents.

*Cur. adv. vult.*

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By an indenture dated February 6, 1905, the first defendant leased to the plaintiff 3 acres of land for four years from the date of the lease in consideration of Rs. 48, which sum the plaintiff paid to the lessor in advance.

The plaintiff says in his plaint that in pursuance of the terms of the lease he felled the jungle on the land and sowed it with fine grain and planted 1,800 plantain bushes thereon; and that on January 22, 1907, the workmen of a servant of the defendant company, alleging that the company had bought the land, unlawfully and forcibly cut down the fence of the land and rooted out 800 plantain bushes standing thereon, and " is " (meaning apparently that the defendant company is) in the unlawful and forcible possession of the land. He then says that in the lease the first defendant undertook to warrant and defend the title, and to settle any dispute which might arise during the term of the lease. And the plaintiff claims (1) a declaration of his title to possession for the term of the lease; (2) possession; (3) damages; or (4) in the alternative that the first defendant may be ordered to refund the said Rs. 48 and to pay damages.

[1] *(1891) 9 S. C. C. 189.*

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The first defendant by her answer said that the plaint disclosed no cause of action against her. The District Judge held that this was a good defence, and dismissed the action as against the first defendant. Before considering whether this was right, I will state the rest of the facts.

The second defendants, the company in their answer do not admit that the plaintiff felled jungle and sowed the land and planted plantains in pursuance of the lease; and they say that by deed dated February 3, 1906, registered on February 9, 1906, they bought from the first defendant an estate, of which the premises described in the plaint form part, and that, by virtue of the registration of the said deed before the plaintiff's lease, the plaintiff's claim against them is not maintainable.

The only issue suggested between the plaintiff and the company was whether the plaintiff's lease was void as against the company. The company's proctor submitted that the plaintiff's lease was not registered until January 4, 1907 (as to which there is no evidence or admission recorded, though the District Judge says in his judgment that it is admitted). The plaintiff's proctor then said that he was not asking for judgment for the land, but for improvements on it; and that he was a *bona fide* possessor of it; and that he would confine his prayer to damages, and would give up the prayer for possession. The company's proctor said, in reply, that the improvements, if any, were not permanent or necessary. Thereupon, without any other issue being settled or any evidence being taken, the District Judge dismissed the action as against the company. He said " the point I have to decide is, whether the lease to the plaintiff is void as against the company by virtue of the prior registration of the transfer in favour of the company. " Having said so he did not decide the point, and made on further reference to it. He dismissed the action, because the only claim then made against the company was for damages, and " no owner can be liable for damages for keeping out of possession one who has an inferior title; " he thought the case would have been different if compensation for improvements had been claimed, but, he said, " in this case there is nothing whatever about compensation, and no suggestion in the whole plaint that any improvements have been effected on the land. "

There, I think, he is in error. The plaint (paragraph 4) does not allege or ask for damages simply " for keeping out of possession, " but also for cutting down the plaintiff's fence and uprooting his plantains; and the Judge has recorded that the plaintiff's proctor on the day of the hearing said that his client was asking for judgment " for improvements for the land," because he was a *bona fide* possessor. The company in their answer deny the allegations in the 4th paragraph of the plaint. There should have been issues (1) whether the company did the acts complained of in the 4th

paragraph of the plaint; (2) (unless it is admitted) whether the company's deed of transfer was registered before the plaintiff's lease; (3) whether the plaintiff was in possession and was dispossessed by the company otherwise than by process of law; and (4) if so, to what damages, if any, he is entitled. If the 1st and 3rd of these are decided in the affirmative, it appears to me that the plaintiff will be entitled to a decree for possession under section 4 of Ordinance No. 22 of 1871, and for damages for the wrongful acts complained of, even though it is held that the company have a better title than the plaintiff.

I now come to the case against the first defendant. Against her the plaintiff claims " in the alternative " refund of the Rs. 48 and damages. The plaint is not well worded, but I can give no other meaning to the words " in the alternative " than " if the claim for declaration of title to possession fails." If it is proved or admitted that after leasing the land to the plaintiff, that is, selling it to him for a term of four years and receiving from him the purchase money, she sold it again to the company, the question whether the latter sale was a breach of her covenant to warrant and defend the plaintiff's title, or gives any other cause of action to the plaintiff, is one to be tried. The District Judge says that she had a perfect right to sell her land, notwithstanding the subsistence of the lease. Surely not, unless she sold it subject to the lease. If nothing more appears than that she sold the same thing twice over and received the purchase money twice over from two different persons, so that one of them must lose the benefit or part of the benefit of his purchase without any further explanation of her conduct, it was certainly dishonest, and I hope it was illegal. But she may have a good defence; and she has set up a claim in reconvention; and these are matters which should be inquired into. I think the District Court should settle issues of fact and law and try them.

I think the decree of the District Court should be set aside, and the case go back to the District Court to settle and try the issues which I have indicated. Appellant to have the costs of this appeal. Costs in the District Court up to date to be costs in the cause.

MIDDLETON J.—

This was an action by a lessee against his lessor, the first defendant, and a purchaser from his lessor, the second defendant company, to be declared entitled to possession of the land leased for the term of the lease, to be placed and quieted in possession, and for damages.

On February 6, 1905, the first defendant leased a portion of Bulatwalkandewallemullewatta for four years to the plaintiff, who paid in advance the sum of Rs. 48 and took possession. This lease was not registered, but the plaintiff covenanted in it not to cut useful trees and to plant plantain bushes and cereal products

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therein, and that if the first defendant desired to plant cacao or rubber thereafter amidst the plantains and cereals, she should be permitted to do so.

On February 3, 1906, the first defendant sold the land in question with other land to the second defendant company, the sale being registered on February 9, 1906. On January 22, 1907, the second defendant company, by their agent and superintendent, took possession under the conveyance, and the plaintiff alleges that they did so forcibly, cutting down a fence and uprooting plantain bushes to the value of Rs. 1,800, while the second defendant alleges that possession was merely taken under the conveyance, and, denying the damage, asserts that the plaintiff had planted in breach of his covenant in the lease and had exceeded the acreage thereunder conceded to him.

As between the plaintiff and first defendant an issue was agreed to:—Is this action maintainable by the plaintiff? After argument by the proctors on both sides the District Judge dismissed the plaintiff's action, holding the first defendant had a perfect right to sell the land, notwithstanding the subsistence of the lease.

As between the plaintiff and the second defendant the following issue was agreed to:—Whether the lease is void as against the second defendant company by virtue of prior registration.

The plaintiff's proctor in the course of his argument disclaimed right to possession, but confined his prayer to damages against the second defendant company.

The District Judge in giving judgment stated that the point he had to decide was whether the lease to plaintiff was void as against the second defendant company by virtue of the prior registration of the transfer in favour of the company, but overlooking that point proceeded, without in fact deciding it, to discuss plaintiff's claim for damages, and, differentiating between damages and compensation, appears to have held that the Supreme Court decision in District Court, Kurunegala, 2,493, did not apply, and dismissed the plaintiff's action against the second defendant.

The plaintiff appealed, and by his counsel contended, although he did not claim it, that by reason of the forcible dispossession he was entitled to a possessory decree as against the second defendant, and further, for the value of his improvements on the land, whether it was denominated compensation or damages, and as against the first defendant that he was entitled to a refund of his lease money.

For the first defendant it was contended that the case in *1 Balasingham 8* was exactly in point. He had given the plaintiff possession, and the plaintiff's legal course was to proceed against the second defendant company in a possessory action, and under the circumstances plaintiff had no cause of action against the first defendant, and no issue had been suggested as to the refund of the purchase money.

As regards the second defendant company, it was urged that no issue was placed before the Court as to compensation or damages, though the District Judge had in fact decided as if there had been one, and that the District Judge was right in holding that no action lay against the second defendant company for taking possession under its registered conveyance of the property it had legally purchased.

In my opinion the plaintiff had a good cause of action against the second defendant company under section 4 of Ordinance No. 22 of 1871 for being dispossessed otherwise than by process of law, and brought the present action, which might have been treated as a possessory action within time.[1] The dispossession of the plaintiff by the second defendant company in this case if not actually forcible was certainly otherwise than by process of law.

This Court has held in *5 N. L. R. 320* that upon a forcible ouster proof of dispossession and forcible ouster is all that is necessary to be proved to entitle a plaintiff to a possessory decree, it not being even necessary to prove possession for a year a day. By various decisions this Court has consistently upheld the principle of the Roman-Dutch Law that persons are not entitled to take the law into their own hands.

The plaintiff in this case does not seek possession as being of no value to him. There is no question that he was in possession, and that his possession as a lessee was a *bona fide* one under his lease. As such he is entitled to compensation for *impensæ utiles*,[2] and, I think, for any damage that may have happened to him by the second defendant company enforcing their right without proceeding in the ordinary course of law.

The judgment in the case set out in the record (226, District Court, Kurunegala, 2,493) also supports the equitable right of the plaintiff to compensation for improvements, if such be found on the land in dispute. At the same time I hink that if any damage has been caused to the plaintiff by the second defendant company enforcing their right without proceeding in the ordinary course of law, the second defendant company will be responsible for it.

The Roman-Dutch Law appears to me to absolutely deny the right of any person to take possession of property as against the will and without the consent of the person who is in possession of it. " The right arising out of possession consists in every man being entitled to retain whatever he has in his possession, to resist whoever attempts to deprive him of it, and to continue in such possession until another person has judicially established his ownership to the thing." [3]

Again, *Van Leeuven* (*Kotze's translation, vol. I., 1908*) says: " The possessor may protect and maintain himself and his property

[1] *(1898) 4 N. L. R. 195.*
[2] *(1900) 4 N. L. R. 158.*
[3] *Maasdorp's Grotius 49.*

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against any person who seeks to disturb his right of possession, even to the loss of his adversary, and may recover the possession of which he has been deprived or in which he has been disturbed . . . . . . provided this be done while the deed is fresh and without any delay."

Again, *Van der Linden*, translated by *Juta*, page 99, says: "No one may be put out of possession without legal process. Should he be ousted from possession even upon a claim of ownership, the possession must first be put in the same position it was before any inquiry as to the ownership can be entered into."

If this be the law, the acquisition of possession as against the possessor without process of law constitutes an *injuria*, for which reparation must be made in damages, if such be proved.

As regards the first defendant, the plaintiff's right to claim in the alternative against her for the return of the lease money is, I think, well founded on the case reported in *9 S. C. C. 189*.

I therefore think that the judgment of the District Judge should be set aside with costs, and the case should go back for the trial of the issues set out in the judgment of the Chief Justice, the costs in the District Court up to date to be costs in the cause.

*Appeal allowed; case remitted.*